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Aeropolitics in a post-COVID-19 world

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ABSTRACT

We review selected aeropolitical issues that may impact the international aviation sector post-COVID-19. Consideration regarding ICAO's role in coordinating safety provisions using existing frameworks will be important. Issues relating to national airline bailouts and recapitalisation as well as international ownership are also explored. We offer several further, as yet unanswerable, questions about future aeropolitical issues, including how ICAO will continue to address the crisis, implications for air services capacity restrictions, the impact of deglobalisation and the question of state aid for national carriers and other parts of the aviation system.

1. Introduction

The purpose of this paper is to unknot potential aeropolitical issues that some States may need to address in a post-COVID-19 environment. Our use of the term 'aeropolitics' is intentionally broad. It encompasses not only the legal and economic regulatory structures that are in place between two or more States, but it also encompasses State-centred activities, such as infrastructure provision and State investment, and regulatory frameworks governing global air transport.

Prognostications are difficult, even in the absence of deadly viruses. For this reason, our assessment is meant to generate discussion at the State level and within the academic community. Some issues below had already been in play prior to the pandemic, however the current crisis has amplified their significance.

2. The role of ICAO

As a UN agency, the International Civil Aviation Organisation (ICAO) is tasked with, and has experience in, providing global oversight and leadership of regulatory provisions centering around international passenger air transport, particularly in times of crisis. ICAO's founding document, the 1944 Chicago Convention, not only provides the basis for two or more States to conclude an air service agreement (ASA), but also the framework for dealing with international health emergencies. This is not surprising given aviation's role in the spread of communicable diseases (see BOWEN and LAROE, 2006; Hodgkinson, 2007).

ICAO's role is arguably paramount in the context of the 2020 pandemic. Its existing frameworks and agreements address how international aviation addresses concerns of disease spread. For instance,

Article 14 of the Chicago Convention provides:

"Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties".

Several facilitation provisions as well as relevant safety-related SARPs (Standards and Recommended Practices) sit within the technical annexes to the Convention. Annex 9 (titled *Facilitation*, ICAO, 2020a), specifically ¶8.16 of Chapter 8, specifies that, with respect to communicable diseases, States are required to establish a national aviation plan as well as a national facilitation programme and subsequent oversight committee. States are also bound, as per ¶8.12 of Chapter 8 of Annex 9, to comply with health provisions as issued by the World Health Organisation (WHO), another UN agency with whom ICAO works closely. Adherence to WHO instructions are paramount here, for ¶2.4 of Chapter 2 of Annex 9 indicates: "Contracting States shall not prevent an aircraft from calling at any international airport for public health reasons unless such action is taken in accordance with the International Health Regulations (2005) of the World Health Organization."

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Air Transport Association (IATA) is illustrative of the interplay between these legal provisions. Although the details were not known fully at the time of writing, it is possible that the above Section may be the basis of IATA's position with respect to actions taken by Argentina. On April 28, 2020, the [BBC reported \(2020a\)](#) an announcement by the Argentinian government that it had banned commercial sales on flights until September 1, 2020. IATA reportedly sent a letter to the Argentine government suggesting that the decision conflicted with the existing ASAs, however precisely how was not entirely clear publicly. At most, ¶2.4 of Annex 9 permits countries to implement public health measures, but it is silent on refusing airlines of trading partners airspace entry. Alternatively, IATA's position may be that *passengers* may be subject to quarantine (as necessary), but *aircraft operations* should not be restricted. Regardless, this may be the beginning of international legal challenges with respect to the scope and intent of ICAO's Facilitation provisions.

As aviation is a recognised actor in biosecurity ([HALL, 2019](#)), naturally there will be interest among States in aligning health policy with aviation policy. States, however, face a dilemma. On the one hand, and as signalled in the Preamble of the Chicago Convention, signatory States have agreed to "create and preserve friendship and understanding among the nationals and peoples of the world, yet its abuse can become a threat to the general security". On the other hand, urgent health-related policies may or may not override this. Arising from this conundrum is the question of States' responsibilities versus adherence to the Chicago Convention and any in-force ASAs. States face tension between the economic and social role of aviation, the desire to preserve public health (by imposing border closures, for instance) and the requirement, as per international law, standards and guidance associated with being a signatory to the Chicago Convention. The aforementioned case involving Argentina is perhaps just one early example of this tension unfolding. With COVID-19, this is complicated by asymptomatic carriers of the virus confounding effective border health checks. As is the case in the UK, Australia, New Zealand and Canada, quarantine requirements (two weeks is typical) are helping to quash supply of and demand for international air travel. In a move that illustrates legal concerns regarding government actions, [REUTERS \(2020a\)](#) reported on June 12, 2020 that Ryanair, British Airways and easyJet were taking legal action, by way of judicial review, against the UK Government over its policy as introduced in early June that required a 14-day quarantine period. The three airlines argued ([BBC 2020b](#)) that the policy is excessively restrictive, may not have been based on scientific evidence and there was a lack of consultation.

Finally, ICAO is positioned to offer forward guidance on passenger protection and whether there will be harmonisation (again, through ICAO with assistance from a variety of organisations, including IATA and Airports Council International (ACI)) in standard safety protocols. In early March 2020, [ICAO \(2020b\)](#) adopted a Declaration that recalled the aforementioned Article 14 and urged States to adopt the provisions and SARPs of Annex 9, collaborate with public health in information sharing and join the Collaborative Arrangement for the Prevention and Management of Public Health Events in Civil Aviation (CAPSCA). Starting on January 24, 2020, it has been both directly from ICAO and through CAPSCA that numerous resources have been disseminated, including, for example, regular updates that outline the effects of the virus/disease on civil aviation, guidance for civil aviation authorities on safety risks and initial guidance on the concept of public health corridors (the so-called Public Health Corridor Concept, or PHCC).

On April 29, 2020, ICAO established a COVID-19 Aviation Recovery Task Force (CART), with the aim "to identify and recommend strategic priorities and policies for States and industry operators" ([ICAO, 2020c](#)). The CART report was adopted by ICAO Council on June 1, 2020 and provides 10 key principles for restart and recovery and makes 11 recommendations. For example, with respect to economic and financial measures, the report ([ICAO, 2020d](#)) argued that these "should be inclusive, targeted, proportionate, transparent, temporary and consistent with ICAO's policies, while striking an appropriate balance of interests

without prejudice to fair competition." It also notes the need to "strengthen public confidence." The Report is accompanied by comprehensive guidance material covering airports, aircraft, crew and cargo as well as public health risk mitigation.

ICAO has also offered guidance on safety risks ([ICAO, 2020e](#)) with an effort to "coordinate, collaborate, and communicate". At the time of writing some airlines (but not all; see [REUTERS, 2020b](#)) have produced seat maps that, going forward, effectively block out middle seats in an effort to maintain safe physical distancing. It is unclear on whether this is medically sufficient and whether shrunken passenger demand is ameliorated by this policy. Guidance from IATA in May 2020 ([IATA, 2020a](#)) indicated that face masks are recommended but that "it should not be assumed that physical distancing on board (e.g., through blocked seats) would be necessary". Most US airlines follow this guidance as of the end of May 2020 ([FORBES, 2020](#)).

One further issue being addressed by the ICAO Council at the time of writing relates to the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) scheme designed to provide market-based measures to reduce aviation emissions. The base years for CORSIA are currently 2019 and 2020, however IATA argues that, because of substantially lower emissions in 2020 because of the pandemic, only data from 2019 should be utilised ([IATA, 2020b](#)).

3. Bailouts, recapitalisation and ownership

Despite strong growth in certain regions in recent years, the business of passenger transport was, leading up to the pandemic, nevertheless characterised by small margins and significant operating costs. As well as being a key enabler of tourism, aviation plays a critical role as a conduit for global supply chains ([MORRELL and KLEIN, 2019](#)). It must be remembered that belly-hold cargo capacity (with tourists seated above) is vital for many economies. For most countries, therefore, aviation is positioned importantly in any economic restart post-COVID-19.

Some airlines and related aviation sectors, such as airports and air traffic control providers, have signalled to their respective national governments the need for financial support in the form of loans, grants, other cash or fee waivers. Because of the provisions in most bilateral ASAs, international airlines only have restricted access to global capital markets. Governments thus face more pressures. First, with government financial resources especially stretched with mass unemployment and fiscal stimuli urgently needed, as well as other industries equally in need of financial support, governments grapple with how much priority should be given to aviation. For a few countries, this includes their aerospace industries, the airliner and engine manufacturers and their respective supply chains. This issue arose during negotiations for a German government equity injection into Lufthansa (eventually approved on May 25, 2020), where it was proposed that it be conditional on the airline not cancelling any orders it has with Airbus ([Aviation24 2020](#)). It is also complicated by the WTO Agreement on Trade in Civil Aircraft, the source of a major long-running dispute between Boeing and Airbus (see below).

Second, in States with multiple airlines, this will necessitate questions of resource allocation on the part of Governments. Some national airlines (when more than one exist) might be in entirely different financial situations. IAG subsidiary British Airways and Virgin Atlantic, part owned by Delta, are examples of this. Third, some airlines are providing "essential" services to remote regions. In those instances, a pertinent question arises as to whether a government is obligated to underwrite or provide capital to all airlines equally.

Fourth, and related, where multiple airlines exist with different business models and cash positions, governments may need to decide, given limited resources, which business model has the best hope going forward once government support is no longer needed. For example, to what extent should governments offer financial relief to airlines whose business models focus on high density, such as low-cost airlines,

particularly when physical distancing may be necessary and thus presenting a challenge to yield and profitability? Finally, the issue of associating aid with sustainability principles and binding carbon/emissions targets has also been raised, for example in France (FLIGHTGLOBAL, 2020) over conditional support for Air France and in Europe more generally (Financial Times 2020).

Lee and Dy (2015) helpfully characterise airline ownership and control in terms of qualitative (control) and quantitative (ownership) dimensions. These distinctions, combined with traffic/capacity rights, are used to determine market access. Typically, States would permit airlines of their trading partners access only if they met the common “substantial ownership and effective control” provision contained within the ASA (recognising that there exist some rather more relaxed criterion, such as principal place of business and effective regulatory control).

A recent example during the pandemic highlights an instance where ownership may have implications other than market access, and particularly when market access is not especially threatened. IAG is a Spanish-registered holding company and is the single (parent) shareholder in British Airways (as well as Aer Lingus, Iberia, Level and Veuling). As of the end of April 2020, the airline cut nearly 12,000 staff (REUTERS, 2020c) and has signalled that it does not intend to seek formal bailout or government-backed loans. However, at the time of writing, the financial repercussions of the pandemic are only just starting to be felt. IATA, for instance, has warned publicly that recovery could be slow amidst uncertain demand for air travel (IATA, 2020c). Should capital injections be necessary going forward, particularly if the extent and/or uncertainty of COVID-19 persists, will the UK Government offer such capital (or loans) in order to preserve connectivity irrespective of EU state aid rules (discussed above with respect to Air France) or will there be resistance to such an idea given IAG’s foreign ownership profile? This example demonstrates that the qualitative/quantitative distinctions used to confer market access are a factor in determining the political decision to offer state aid. As the economic damage from the pandemic continues, further examples will arise.

In the coming months, as more information becomes publicly available, additional examples of how airlines have been restructured and assisted by States to meet the massive challenges COVID-19 poses will eventuate. Specific examples such as Avianca, LATAM, SAS and Cathay Pacific could be worthy of investigation, as these have complicated multinational structures that involve a number of governments. Airport and air traffic management organisation case studies too will provide useful examples of crisis management for future reference.

State aid is also of concern for airframe manufacturers. The decades-long dispute between the United States and the EU with respect to ‘unfair’ state aid provided to Boeing and Airbus will likely show no signs of abating given each manufacturer is facing delayed deliveries and outright cancellations by airline customers due to flight rationalisation and caution over demand trajectories post-COVID-19 (World Trade Organization, 2020).

The complexity of state aid provision and regulation is demonstrated in the case of Europe, where European Commission (EC) competition regulation and horizontal ASAs (EUROPEAN COMMISSION, 2020a) add extra layers of bailout consideration, particularly the need for States to receive EC approvals before such aid is made available. Typically, existing state aid in the European Union cannot be made by Member States to national companies because of the potential for competition distortion, yet early examples of this have been seen in the aviation sector following the relaxing of such rules under a ‘Temporary Framework’ (EUROPEAN COMMISSION, 2020b). The EC approved on May 4, 2020 a €7 billion state aid package (loan guarantees) to Air France (EUROPEAN COMMISSION, 2020c). Not only was wider EC approval required but, as reported (Deutsche Welle, 2020), there are conditions imposed on Air France by France, including requirements for the airline to be more profitable, reductions in CO₂ emissions, and the suggestion

that the airline continue to purchase aircraft from Airbus. Ryanair CEO Michael O’Leary was quoted (EURONEWS, 2020) as suggesting that state aid targeting national airlines was misplaced: “Air Italia has been renationalised. We don’t want state aid but we would like to see significant reductions in airport charges in Italy instead of these massive doses of state aid crack cocaine.”

4. Future Considerations

Our assessment raises a number of further questions which are not able to be considered in full at present. First, will criticism be levied against ICAO (similar to that directed publicly at the WHO) or will a greater international understanding of its role in the response to international health crises be seen? Second, will liberal (open skies) access and capacity/frequency allowances under existing ASAs be sufficient to carry future demand when large aircraft (for instance, B747 and A380) are being retired (early) during the pandemic? Third, will post-neoliberal ideologies and concerns for climate change result in the contraction of global trade and a rise in deglobalisation (LIVESEY, 2018) with a consequent impact on cargo and passenger demand for international air transport?

Fourth, are airlines with global reach (partially or wholly) going to be viable, if not economically, then politically? For example, Gulf and Southeast Asian airlines have been affected by the crisis. Given their function as global connectors utilising extensive sixth freedom traffic and limited or no domestic operations, they face an uncertain future with the decline in international passenger numbers. Given this, will governments, particularly those who have international aviation industries that make disproportionate contributions to their economies, face particular pressure to underwrite these airlines in order to preserve access and connectivity? Put another way, are some airlines, airframe and engine manufacturers, and the international aviation industry more generally, simply ‘too big to fail’?

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John Macilree: Conceptualization, Formal analysis, Resources, Writing - original draft, Writing - review & editing, Investigation. **David Timothy Duval:** Conceptualization, Formal analysis, Resources, Writing - original draft, Writing - review & editing, Investigation.

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